

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re Application of	)	
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<b>Peak Communications, Inc.</b>	)	Facility I.D. No. 52035
	)	NAL/Acct. No. MB-200841410007
For Renewal of Licensee for	)	FRN: 0013286919
Station KQBE(FM)	)	File No. BRH-20051003BWN
Ellensburg, Washington	)	

**MEMORANDUM OPINION AND ORDER  
AND  
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: February 5, 2008**

**Released: February 6, 2008**

By the Chief, Audio Division, Media Bureau:

**I. INTRODUCTION**

1. The Commission has before it the captioned application of Peak Communications, Inc. (the "Licensee") for renewal of its license for Station KQBE(FM), Ellensburg, Washington (the Station"). In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* ("NAL") issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules"),<sup>1</sup> by the Chief, Audio Division, Media Bureau, by authority delegated under Section 0.283 of the Rules,<sup>2</sup> we find that the Licensee apparently willfully and repeatedly violated Section 73.3526 of the Rules,<sup>3</sup> by failing to retain required documentation in the KQBE(FM) public inspection file. Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of ten thousand dollars (\$10,000), and we grant the captioned KQBE(FM) renewal application.

**II. BACKGROUND**

2. Section 73.3526 of the Commission's Rules requires broadcast licensees to maintain a public inspection file containing specific types of information related to station operations. The purpose of this requirement is to provide the public with timely information at regular intervals throughout the license period.<sup>4</sup> Among the materials required for inclusion in the file are the stations quarterly issues-programs lists, which must be retained until final Commission action on the station's next license renewal application.<sup>5</sup>

3. Section III, Item 3 of the KQBE(FM) license renewal application form, FCC Form 303-S, requests that the licensee certify that the documentation required by Section 73.3526 has been placed in

<sup>1</sup> 47 U.S.C. §§ 309(k), 503(b); 47 C.F.R. § 1.80.

<sup>2</sup> See 47 C.F.R. § 0.283.

<sup>3</sup> See 47 C.F.R. § 73.3526.

<sup>4</sup> Cf. *Letter to Kathleen N. Benfield from Linda B. Blair, Chief, Audio Services Division* (Apr. 3, 1997), 13 FCC Rcd 4102 (1997) citing *License Renewal Applications of Certain Commercial Radio Stations*, 8 FCC Rcd 6400 (1993).

<sup>5</sup> See 47 C.F.R. § 73.3526(e)(8).

the Station's public inspection file at the appropriate times. The Licensee indicated "No" to that certification and attached an Exhibit, later amending that Exhibit to explain that:

"... during the (first) six years of the station's current license term, the station did not fully comply with the requirements of FCC Rule 73.3526, i.e. public file requirements, particularly with regard to the requirements of Section (e)(12) of the rule regarding the preparation and maintenance of issues/programs lists.

As the result of a change of management on January 1, 2005, and immediately upon discovery of the file condition, efforts have been made to update the file with all the requisite documents and lists. Unfortunately, the status of the station's records were such that it is impossible for Peak Communications and its staff to re-create the issues/programs lists before that date."<sup>6</sup>

The Station did compile issue/programs lists for the first, second, and third quarters of 2005, supplying copies of those lists in an amendment to the application dated October 20, 2006. The Licensee also states that it neglected to prepare and insert into the Station's public inspection file the required biennial ownership report for 2003, although it states that no significant ownership changes had occurred.

### III. DISCUSSION

4. *Section 73.3526 Violation.* As the Licensee has acknowledged, at the time of filing of the KQBE(FM) license renewal application, and during periods within the license term, the Station's public inspection file did not contain many of the items required to be retained in the file by Section 73.3526 of the Rules. In this regard, where lapses occur in maintaining the public file, neither the negligent acts or omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation.<sup>7</sup>

5. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have failed willfully or repeatedly to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>8</sup> Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.<sup>9</sup> The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,<sup>10</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>11</sup> Section 312(f)(2) of the Act provides that "[t]he 'repeated,' when used with

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<sup>6</sup> See captioned application at Exhibit 11; see also Amendment filed October 20, 2006, wherein the missing lists are provided for the first, second and third quarters of 2005.

<sup>7</sup> See *Padre Serra Communications, Inc.*, Letter, 14 FCC Rcd 9709 (MMB 1999) (citing *Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970) and *Eleven Ten Broadcasting Corp.*, Notice of Apparent Liability, 33 FCC 706 (1962)); *Surrey Front Range Limited Partnership*, Notice of Apparent Liability, 7 FCC Rcd 6361 (FOB 1992).

<sup>8</sup> 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. 1.80(a)(1).

<sup>9</sup> 47 U.S.C. § 312(f)(1).

<sup>10</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>11</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”<sup>12</sup>

6. The Commission’s *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$10,000 for violation of Section 73.3526.<sup>13</sup> In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”<sup>14</sup>

7. In this case, although the licensee admitted to violating Section 73.3526, it did so only in the context of the question contained in its license renewal application that compelled such disclosure. Moreover, the violations were extensive, occurring over a six-year period during the license term and involving at least 24 missing issues/programs lists and an ownership report. Considering the record as a whole, we believe that a forfeiture of \$10,000 for the Section 73.3526 violations is appropriate in this case.

8. *License Renewal Application.* In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Act.<sup>15</sup> That section provides that if, upon consideration of the application and pleadings, we find that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.<sup>16</sup> If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”<sup>17</sup>

9. We find that the Licensee’s apparent violation of Section 73.3526 of the Rules does not constitute a “serious violation” warranting designation for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.<sup>18</sup> Further, we find that

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<sup>12</sup> 47 U.S.C. § 312(f)(2).

<sup>13</sup> See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (“*Forfeiture Policy Statement*”), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

<sup>14</sup> 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

<sup>15</sup> 47 U.S.C. § 309(k).

<sup>16</sup> 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

<sup>17</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

<sup>18</sup> For example, we do not find here that the Licensee’s Station operation “was conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies.” See *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that “the number, nature and extent” of the violations indicate that “the licensee cannot be relied upon to operate [the Station] in the future in accordance with the requirements of its licenses and the Commission’s Rules.” *Heart of the Black Hills Stations*, 32 FCC2d at 200. See also *Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991), *Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).\

Station KQBE(FM) served the public interest, convenience, and necessity during the subject license term. We will therefore grant the license renewal application below.

#### IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Peak Communications, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of ten thousand (\$10,000) for its apparent willful and repeated violation of Section 73.3526 of the Commission's Rules.

11. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, Peak Communications, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

12. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

13. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington D.C. 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the *NAL*/Acct. No. referenced above.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

15. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>19</sup>

16. IT IS FURTHER ORDERED that, pursuant to Section 309(k) of the Communications Act of 1934, as amended, the license renewal application of Peak Communications, Inc. for Station KQBE(FM), Ellensburg, Washington (File No. BRH-20051003BWN) IS GRANTED.

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<sup>19</sup> See 47 C.F.R. § 1.1914.

17. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Peak Communications, Inc., 109 E. 3<sup>rd</sup> Avenue, Suite No. 5, Ellensburg, Washington 98926, and to its counsel, J. Dominic Monahan, Esquire, Luvaas Cobb, P. O. Box 10747, Eugene, Oregon 97440-2747.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau